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IN THE

Supreme Court of the United States

October Term, 1968

WALTER J. HICKEL, SECRETARY
OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF JOSEPH B. UMPLEBY, ET AL. IN OPPOSITION

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QUESTION PRESENTED

This Court has twice emphatically ruled that the Secretary was without authority to void a claim for failure of the mineral locator to perform annual assessment work on an oil shale mining claim. The question is whether every claimant was required to bring a separate lawsuit attacking the Secretary's unlawful action? Stated another way, could the mineral locators rely upon this Court's two pro-

nouncements and upon the Secretary's recognition of the fact that he was without subject matter jurisdiction to declare a forfeiture for failure of annual assessment work?

STATEMENT OF THE CASE

In the lower Court, four cases were consolidated for trial. Joseph B. Umpleby, et al, were plaintiffs in one of those cases, and the trial Court found: that they had located certain oil shale mining claims in 1918; that these claims were the subject of a contest proceeding in 1929, and that the claims were declared invalid in that proceeding for failure to perform annual assessment work. (App. c, p. 25a) Shortly thereafter, this Court decided *Wilbur v. United States ex rel Krushnic*, (1930) 280 U. S. 306, and later, (1935) *Ickes v. Virginia-Colorado Development Corporation*, 295 U. S. 639. Immediately following *Virginia-Colorado*, the opinion in *The Shale Oil Company* (1935), 55 I.D. 287, was issued, and that Departmental decision commented on *Virginia-Colorado* as follows:

> ". . . the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law."

ARGUMENT

1. The government seemingly admits that if *Virginia-Colorado* held, as it manifestly does, that the Secretary was without power to cancel for lack of assessment work, the decision below is correct. Surely this Court has repeatedly held that where agency action exceeds the power granted the agency, the action is void. *Cameron v. United States*, 252 U. S. 450, 459; *Callanan Road Co. v. United States*, 345 U. S. 507, 512; *Payne v. Central Pacific Railway Co.*, 255 U. S. 228, 236. In the words of the Tenth Circuit, these consolidated cases are indeed "like a voice out of the past . . . with the clearly established legal propositions directly applicable to them . . . thought to be at rest." App. A. p.

16a, 406 F. 2d 765. Since 1930, everyone, including petitioner's predecessors in office, have thought that the law was settled that although failure to perform annual assessment work might subject a claim to relocation, such a failure gave the Department no right to declare a forfeiture, and all thought that the Mineral Leasing Act of 1920 made no change in that rule.

Virginia-Colorado holds:

> "The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the Act provides for leases. But by express provision the act saved existing valid claims 'thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws.' Section 37 of the Act (30 U.S.C. §193). What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of lack of discovery, fraud or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture.
>
> . . . *The Department's challenge, its adverse proceeding, and the decision set forth in the bill went beyond the authority conferred by law.*" [emphasis supplied.]

This language hardly supports petitioner's present contention that *Virginia-Colorado* was dismissed for failure to state a cause of action. *Virginia-Colorado* was decided on the broad issue of power, and nothing has happened in the meantime to increase the Secretary's subject matter jurisdiction in this area.

It is to be remembered that in *Virginia-Colorado* there "was no suggestion of lack of discovery, fraud or other defect," and there was "no ground for a charge of abandonment." The Secretary in effect here urges that there should be a wholesale finding of abandonment, illogically

grounded upon the mineral claimant's reliance on the decisions of this Court holding that the claimant loses nothing because of lack of assessment work. However, the Secretary overlooks the trial judge's finding that there was "no contention here that plaintiffs have abandoned their claims and there is a dearth of evidence to establish acquiescence, express or implied, by plaintiffs in any assumption of jurisdiction by the Department." (App. C, p. 46a).

The Secretary argues that as a matter of administrative convenience the rights of all oil shale claimants should be destroyed in a single mass carnage. In so contending, the Secretary must surely overlook that he is asking for wholesale destruction of vested property rights, and that *Krushnic* said an identical oil shale claim was, "property in the fullest sense of the term. It is alienable, inheritable, and taxable." And, the Secretary must overlook the practices of his predecessors in office who (as noted by the lower Court) followed a totally different policy: "The record shows that this policy was expressed in correspondence, public statements, annual reports, and in official action. This official action includes the patenting of a substantial number of oil shale claims during this interval which had been previously cancelled by the Department for failure to do assessment work." (App. A, p. 11a). Perhaps more important, the trial judge found that "the Department not only clearly recognized its lack of authority to deal with the assessment work problem in the case before it, but also it cleared the record by overruling all prior decisions." (App. c, p. 41a).

In *Krushnic* in 1930, and in *Virginia-Colorado* in 1935, this Court decared that the Mineral Leasing Act made no change in the rule that failure to do assessment work did not open a claim to a declaration of forfeiture in favor of the government. For a third of a century Congress has known of these decisions, and Congress, which has the exclusive authority to amend the statute on which the decisions are founded, has taken no action. Congress could

have, and it now can, impose the risk of forfeiture on a mining claimant of Leasing Act minerals who fails to perform his assessment work; but, unless *Wilbur v. United States ex rel Kushnic*, supra, and *Ickes v. Virginia-Colorado Development Corp.*, supra, are to be overruled, these claims, which are "property in the fullest sense of the terms," cannot be nullified by the Secretary for lack of assessment work. This is so because the claimants "lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture." *Ickes v. Virginia-Colorado Development Corp.*, supra.

Although, as we have said, Congress could change the law, this Court has twice held that the Secretary's general supervisory powers over the public lands do not extend to confiscation of property rights because of lack of assessment work, and any effort on his part so to do go "beyond the authority conferred by law." In hearings which must follow, some claims may be declared invalid on the ground of abandonment; some may be declared invalid on the ground of fraud and some may be declared invalid on other proper grounds, but each claimant is entitled to his day in court and each is entitled to due process of law in attempting to patent his claim.

2. To argue, as does petitioner here, that claimants are guilty of laches is to argue against all logic and reason. To be guilty of laches, a person must knowingly permit another to assert a claim against him. Here, the claimants knew only that this Court had twice held that the Secretary was without subject matter jurisdiction and that the Secretary had recognized and followed those decisions of this Court. Claimants knew that others whose claims had been illegally cancelled for lack of assessment work had been granted patents thereafter in accordance with the mandate of *Krushnic* and *Virginia-Colorado*, and claimants knew of the decision in *The Shale Oil Company*, supra. Claimants also knew of 43 C.F.R. §3420.4 having to do with assessment work and of its language that the matter of assess-

ment work is, "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts." Claimants certainly had no reason to anticipate the Departmental decision in *Union Oil Company of California, et al* 71 I.D. 179, which, as was said by the trial court, "marked a reversal of the Department's viewpoint and attitude." (App. C. p. 43a.)

In a nutshell, petitioner's argument is that the mineral claimants' rights should be forfeited because they were guilty of relying on this Court's decisions and on the published pronouncements of the Department that any Departmental efforts to cancel for lack of assessment work were "without authority of law and void." *The Shale Oil Company*, supra.

Laches cannot come into play unless and until there is some known claim made against a person, and Union Oil Company marked the first such claim here. The appeal of that decision was immediate. Moreover, of course, delay cannot give life to a void act, and the Secretary's attempted cancellation was void.

3. The decisions of this Court in *Krushnic* and in *Virginia-Colorado* were not wrong. The arguments made by petitioner here as to the correctness of these decisions are the same arguments twice before rejected by this Court. Petitioner argues that there should be finality in administrative decision, but, much more important, there should be finality in judicial decision. To give heed to the government's present position would place in jeopardy well settled principles of property law and would forfeit countless property rights acquired in reliance on what all have believed to be the law of the land. If there is to be change in th law, that change must be effected by Congress to apply in futuro. Congress has found no reason to amend the statute. although since 1930, it has been settled law that failure to do assessment work does not open to forfeiture Mineral Leasing Act claims.

CONCLUSION

No reason for granting the petition for writ of certiorari has been shown. None exists. The petition should be denied.

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